

## APPEAL NO. 93172

On February 9, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The hearing was held under the provisions of the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq.* (Vernon Supp. 1993) (1989 Act). The issues at the hearing were whether the appellant (claimant herein) was injured in the course and scope of his employment with the (employer herein), a self-insured political subdivision of this State, on (date of injury), and whether the claimant reported his alleged injury to his employer not later than the 30th day after the date of injury. The hearing officer determined both issues adversely to the claimant and ordered that the claimant take nothing as a result of his claim. The claimant disagrees with the hearing officer's decision and requests that it be reversed. The employer responds that the claimant did not meet his burden of proof and requests that the decision be affirmed.

## DECISION

The decision of the hearing officer is affirmed.

The claimant worked in the employer's sanitation department. He testified that while at work on (date of injury), he felt a "twitch" in his neck when he lifted a bag of garbage to throw into a garbage truck, but continued to work the rest of the day. The next day, July 10th, he said he could hardly move his arm so he called his supervisor, KP, and reported to him that he had hurt his arm working and that he was going to a doctor. Dr. P, examined the claimant on July 10th, diagnosed cervical radiculopathy, and took him off work. An MRI scan was done which revealed minimal degenerative changes of the cervical vertebra without evidence of fracture or encroachment upon the foramina. On September 16, 1992, the claimant had an operation consisting of an anterior cervical discectomy and fusion at C5-6 and C6-7.

Progress notes from Dr. P office dated July 10 and July 13, 1992, recite that the onset of the claimant's elbow pain, muscle spasm, and numbness in his right arm was two weeks prior to his visits to the doctor (which would be about June 27th to June 30th), that the claimant had "no accident recently," and that problems with the claimant's right shoulder started four to five months ago. The July 10th progress note also states "sanitation worker possible work-related."

The claimant's supervisor denied that the claimant called him on July 10th. The supervisor testified that the claimant called into work on July 13th and July 17th and reported that he was sick. However, the supervisor said that the claimant did not report that he had been injured on the job. The supervisor further testified that in September 1992 he first became aware that the claimant was claiming that he had been injured at work on (date of injury). The supervisor said that in September, when the claimant was out of sick leave, the claimant told him he had to have an operation and was going to use workers' compensation. The supervisor also testified that none of the claimant's coworkers,

including the driver that the claimant worked with, had any information concerning the claimant's alleged injury.

A "compensable injury" means "an injury that arises out of and in the course and scope of employment for which compensation is payable under this Act." Article 8308-1.03(10). It is the claimant's burden to establish that an injury was received in the course and scope of his employment. Spillers v. City of Houston, 777 S.W.2d 181, 186 (Tex. App.-Houston [1st Dist.] 1989, writ denied). For an injury other than an occupational disease, Article 8308-5.01(a) provides that "[a]n employee or a person acting on the employee's behalf shall notify the employer of an injury not later than the 30th day after the date on which the injury occurs." The burden is on the claimant to prove the existence of notice of injury. Travelers Insurance Company v. Miller, 390 S.W.2d 284, 286 (Tex. Civ. App.-El Paso 1965, no writ). To fulfill the purpose of the notice provision, the employer need only know the general nature of the injury and the fact that it is job related. DeAnda v. Home Insurance Company, 618 S.W.2d 529 (Tex. 1980). The hearing officer is the sole judge of the weight and credibility to be given to the evidence. Article 8308-6.34(e). The claimant's testimony as an interested party only raised questions of fact for the hearing officer's determination. Escamilla v. Liberty Mutual Insurance Company, 499 S.W.2d 758, 760 (Tex. Civ. App.-Amarillo 1973, no writ). When presented with conflicting evidence the trier of fact may believe one witness and disbelieve others and may resolve inconsistencies in the testimony of any witness. McGalliard v. Kuhlmann, 722 S.W.2d 694, 697 (Tex. 1986).

In the instant case, the claimant said he was injured at work on (date of injury), but the medical records recite that the claimant's problems began some two weeks earlier. The hearing officer apparently believed that the claimant had an injury, but disbelieved the claimant's testimony that he received the injury while working for his employer. The claimant testified that he timely reported to his supervisor that his injury was work related; however, the supervisor testified that the claimant did not notify the employer that his injury was work related until September 1992, which was well after the 30-day notice period. As the trier of fact the hearing officer may believe all, part, or none of the testimony of any one witness. Burelsmith v. Liberty Mutual Insurance Company, 568 S.W.2d 695, 698 (Tex. Civ. App.-Amarillo 1978, no writ). We do not substitute our judgment for that of the hearing officer where, as here, there is sufficient evidence to support his findings, and the findings are not so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. In Re King's Estate, 150 Tex. 662, 224 S.W.2d 660 (1951); Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ).

The decision of the hearing officer is affirmed.

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Robert W. Potts  
Appeals Judge

CONCUR:

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Susan M. Kelley  
Appeals Judge

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Lynda H. Nesenholtz  
Appeals Judge